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NO. 84-1321

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CRISPUS NIX, Warden of the Iowa State Penitentiary,
Petitioner,

V.

EMMANUEL CHARLES WHITESIDE,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA

JEAN FLEMING POWERS
Assistant Professor of Law
South Texas College of Law
1303 San Jacinto
Houston, Texas 77002
(713) 659-8040
Counsel of Record

DAVID CRUMP
Professor of Law
South Texas College of Law

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INTEREST OF AMICUS CURIAE

The Legal Foundation of America ("LFA") is a nonprofit corporation supporting the operations of a public interest law firm (as that term is defined in Internal Revenue regulations). Its goals include the preservation of a rational system of criminal justice. In pursuit of this goal, LFA has appeared as amicus curiae in this honorable Supreme Court, in the Courts of Appeals, in District Courts, and in the courts of the various states. LFA is located upon the campus of the South Texas College of Law in Houston, Texas. It shares activities and personnel with the law school. All litigation undertaken by LFA is approved by its Board of Trustees, the majority of whom are attorneys.

SUMMARY OF ARGUMENT

The Eighth Circuit's decision interferes with the authority of the States to define the difficult balance between unethical conduct and effective advocacy. The decision would prevent the enforcement of even carefully prepared, balanced standards,

such as the ABA Model Rules of Professional Conduct. At the same time, the lower court's "conflict of interest" reasoning would disqualify competent counsel in every case in which any potential difference arose, even if it were satisfactorily resolved and even though such "conflicts" are so common as to arise in virtually every criminal case. Finally, the Eighth Circuit's decision would prevent counsel from giving sound advice to clients most in need of it, concerning perjury or any of a myriad of other potentially inadvisable courses of conduct.

ARGUMENT

I. THE REASONING OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND OF THE IOWA SUPREME COURT REPRESENT BETTER RESOLUTIONS OF THE QUESTIONS AT ISSUE THAN THE OPINION BELOW.

In *United States v. Curtis*, 742 F.2d 1070 (7th Cir. 1985), the Seventh Circuit stated that since it seemed "apparent that [the defendant] would have testified perjuriously, counsel's refusal to put him on the witness stand cannot be said to have violated [his] constitutional rights." [1] In the present case, the Eighth Circuit assumed that the defendant would have testified falsely, but it held counsel "ineffective" for adopting a course of conduct that was less intrusive than that in *Curtis* and that fully protected the right of the client to testify. [2] The Seventh Circuit's reasoning and that of the Iowa Supreme Court, which commended counsel in this case for the "high[ly] ethical manner" in which he represented his client, are superior to the reasoning of the Eighth Circuit. [3]

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1 742 F.2d at 1076.

2 Whiteside v. Scurr, 744 F.2d 1323, 1329 (8th Cir. 1984). The dissent in the denial of the motion for rehearing points out the incon-

II. THE DECISION OF THE EIGHTH CIRCUIT WOULD INTERFERE UNDULY WITH THE AUTHORITY OF STATES TO PREVENT UNETHICAL PRACTICES, WOULD MAKE ENFORCEMENT OF REASONABLE STANDARDS SUCH AS THE ABA MODEL RULES IMPRACTICAL, WOULD DISQUALIFY COMPETENT COUNSEL FOR REASONABLE HANDLING OF COMMON ETHICAL QUESTIONS, AND WOULD PREVENT THE GIVING OF SOUND ADVICE TO CLIENTS MOST IN NEED OF IT.

A. The decision of the Eighth Circuit unnecessarily interferes with rights of states to determine ethical standards for attorneys practicing in their courts. It would prevent the enforcement of the ABA Model Rules of Professional Conduct.

The decision below is in conflict with the Model Rules of Professional Conduct, even though the opinion includes those

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gruity of the holding by quoting the following excerpts from the opinion:

> [W]e presume that appellant would have testified falsely.
>
> * * * *
>
> * * * Counsel threatened appellant that he would withdraw from the case, advise the state court trial judge of appellant's intention, and testify against him as rebuttal witness for the prosecution. Counsel's actions prevented appellant from testifying falsely. We hold that counsel's action deprived appellant of due process and effective assistance of counsel.
>
> * * * *
>
> Counsel's actions also impermissibly compromised appellant's right to testify in his own defense by conditioning continued representation by counsel and confidentiality upon appellant's restricted testimony.

Whiteside v. Scurr, 750 F.2d 713, 714-15 (8th Cir. 1984), citing 744 F.2d at 1328, 1329.

3 State v. Whiteside, 272 N.W.2d 468, 471 (Iowa 1978).

Rules as an appendix. The Rules and Commentary expressly require an attorney to "persuade the client to refrain from perjurious testimony." [4] Given the present decision, it would be impractical for a lawyer to "persuade" the client against perjury, since he would be likely to make himself ineffective, and violate the Constitution, by that action.

The Model Rules and Commentary further provide that a lawyer "shall not knowingly offer evidence" that is false and "may refuse to offer evidence that the lawyer reasonably believes is false," [5] exactly as the lawyer did in this case. These Rules would be extraordinarily difficult for real-world counsel to implement consistently with the decision below. The Rules and Commentary also recognize the need for the lawyer to "exercise control over the proof." [6] They follow the decisions of this honorable Supreme Court in stating that "an accused should not have a right to assistance of counsel in committing perjury." [7] The attorney in this case took very modest measures to address these concerns, and for those measures he has been labelled constitutionally "ineffective."

The Model Rules are the official draft of the American Bar Association expressing professional standards for attorneys. They are intended for adoption by States in the regulation of the legal profession. The present decision would make their adoption difficult for many States.

The Model Rules are further the product of lengthy and occasionally heated debate within the ABA concerning the ap-

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4 MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 comment (1983).

5 MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(4), (c) (1983).

6 MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 comment (1983).

7 Id. See Harris v. New York, 401 U.S. 222, 225 (1971).

propriate middle ground between two polarized viewpoints.[8] The late Robert Kutak, Chair of the ABA Committee on Professional Standards, wrote as follows in explaining and supporting the Model Rules:

> [W]e must reject any notion that the professional role should parallel the policeman's. We also must reject any notion that the professional role must, at times, be that of coconspirator. Between those two poles lies the proper role of the lawyer who must provide zealous representation of clients but remain within the bounds of law. [9]

The present decision presents substantial questions because it will frustrate efforts to achieve that middle ground so diligently sought by the American Bar Association. It would mean that every state adopting the ABA's Model Rules could not enforce provisions that are essential to the balance.

The Eighth Circuit purported to defer to the authority of the state supreme court "on all questions of state law."[10] But the decision leaves the states with few options in determining ethical standards for attorneys in the area of client perjury. It is the states that have responsibility for enforcing the criminal law against perjury committed in their courts, as well as regulating the legal profession—a responsibility they have had since before the founding of the Republic. This issue is not one that lends itself to clear, black-and-white resolution, but rather involves policy decisions, and the present decision prevents the States from making those policy decisions.

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8 The Court below cites a few of the numerous articles written on this topic even before the discussion draft of the Model Rules was released.

9 Kutak, A Commitment to Clients and the Law, 68 A.B.A.J. 804, 805 (1982).

10 744 F.2d at 1330.

This Court has recently pointed out that "of course, the Sixth Amendment does not require that counsel do what is impossible or unethical." *United States v. Cronic*, 104 S.Ct. 2039, 2045 n. 19 (1984). In drafting the Sixth Amendment, the framers of the Constitution could not have intended to give rights to defendants that require unethical behavior by counsel. At a time when public confidence in both the ethical standards of attorneys and the ability of the criminal justice system to deal effectively with crime is especially low, the States must not be put into a situation in which they must choose, as apparently they must in this case, between legal and ethical conduct of the attorneys who are officers of their courts and the ability to obtain binding criminal convictions.

B. The decision of the lower court opens the door to a claim of conflict of interest in any case in which an attorney must make difficult ethical decisions

The lower court's conclusion that this case presents an actual conflict of interest, which is necessary for finding a presumption of inadequate assistance of counsel,[11] is erroneous. None of the actions indicated by the attorney, which might have resulted in a situation of actual conflict had the client persisted in his stated intent to commit perjury, were ever taken, and, thus, the "conflict" never developed. All the attorney actually did was advise his client of the *potential* conflict in the event of actual perjury, much as an attorney advises clients of the *potential* for conflict in a multiple representation situation.[12] In the

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11 Strickland v. Washington, 104 S.Ct. 2052, 2067 (1984), citing Cuyler v. Sullivan, 446 U.S. 335, 348, 350 (1980).

12 In this case, the potential for conflict evaporated when the defendant decided to tell the truth. The Supreme Court cases cited by the Eighth Circuit regarding the conflict, Strickland v. Washington, 104 S.Ct. 2052 (1984), and Cuyler v. Sullivan, 446 U.S. 335 (1980), refer to conflicts in the situation of multiple clients in a single case, a situation which arises only in a specific type of case, and for which there are reasonable guidelines.

latter case, this Court has pointed out that "until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance,"[13] and "a reviewing court cannot presume that the possibility for conflict has resulted in ineffective assistance of counsel."[14]

In fact, one could easily conclude that a greater conflict would be involved in following the ABA Proposed Defense Function Standards, which the Eighth Circuit apparently approves. Those standards suggest a course of conduct including discreetly making a record of the fact that the defendant is taking the stand against the advice of counsel, refraining from direct examination "in the conventional manner" and refraining from arguing or relying upon the false testimony.[15] Surely, trying to walk this fine line between protecting oneself in a continuing representation while trying to adequately represent the client and not reveal the perjury presents a much greater conflict than dealing with the problem in the privacy of the attorney-client relationship, and putting it behind.

The interest of an attorney in protecting himself against charges of criminal or unethical behavior is always present, and his actions are always influenced in some manner by such considerations. In this sense, the attorney is always a "potential adversary" of his client. To the extent that the attorney in this case was put in a situation of "conflict," *every* attorney temporarily facing such a dilemma, no matter how it is ultimately resolved, can be said to have exactly the same conflict of interest.

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13 Cuyler v. Sullivan, 446 U.S. at 350.

14 Id. at 348.

15 ABA Project on Standards for Criminal Justice: The Prosecution Function and the Defense Function, Proposed Defense Function Standard 4-7.7(c) (2 ed. 1980), appended to 744 F.2d at 1331.

C. The lower court's decision is potentially more detrimental to effective assistance of counsel than the action taken by the defendant's attorney.

A client is not expected automatically to know what the consequences of his actions might be. The very basis for the right to counsel lies in the fact that the client generally will not have the knowledge necessary to make informed choices about his case without counsel. It would be anomolous indeed if an attorney could not advise his client regarding the legality, advisability, and possible consequences of such a serious action as that contemplated by the defendant herein for fear of thereby being found constitutionally "ineffective."

Additionally, the attorney's action in preventing the perjury was in the client's best interest, and not just a means of protecting his own interest, as the lower court suggests. Any attorney who would acquiesce in the commission of a new crime by his client, subject to another prosecution, is not serving the best interests of his client. Furthermore, given that the defense was based on a theory of self-defense, making the credibility of the defendant very important,[16] the attorney would have been remiss had he *not* made every effort to deter the defendant in his perjurious intent, which would have been extremely disadvantageous before the jury. Thus the decision below would hurt the very class of persons the court of appeals sought to protect, namely persons accused of crime and needing effective advice of counsel.

CONCLUSION

The Court should reverse the decision of the Eighth Circuit and hold that the representation at issue was not ineffective.

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16 There were eyewitnesses whose testimony could have been used to impeach the defendant. The attorney was able to observe the defendant and make his own professional evaluation of how the contemplated testimony might be received by the fact finder.

Respectfully submitted,

Jean Fleming Powers
Assistant Professor of Law
South Texas College of Law
1303 San Jacinto
Houston, Texas 77002
(713) 659-8040
Counsel of Record

David Crump
Professor of Law
South Texas College of Law